what those enquiries were. Although you can know what the Police said to the accused, you cannot be told what the accused said to the Police while they were in the custody of the Police. But the Inspector tells you that he said to the man, that is the first accused in the dock: "Who else were involved in the robbery." That is what he gives as the words he used: "Who else were involved in the robbery." And as the story is that there were six people, of course, that may mean: "Who were the other five". In answer to that question, you are told that the first accused then took the Police to No. 39 Jalan Besar, where they found the second accused."

The use of the words "who were the other five" seems to me to be an invitation to the jury to conclude that the appellant was the missing one.

This seems to me to be entirely wrong. Even if the question were admissible, it does not necessarily follow that the appellant had said anything of the sort, nor did it necessarily follow that the question related to anything that this appellant had said. Even if he had referred to one person, that person was not necessarily himself.

It is also wrong to refer to an act as being the consequence of another act or statement which is withheld from the jury. Whether a thing is the consequence of another is a matter of opinion in every case, inference which a jury may form, not a statement of fact. The learned Judge also said: "You can know what the Police said to the accused." Without qualification, I think that that is a misleading statement of the law. It is commonly stated in English law that what is stated in the presence of a party is evidence against him. It should be noted that this is not now to be treated as an exception to the rule against hearsay but as evidence of a *factum probans,* in light of the reaction of the party to what is said (see *Rex v. Christie*[1]). The rule against hearsay is found in section 60 of the Evidence Ordinance. On this matter I think that the rule is the same as in England and that under that section evidence of statements might be admitted provided always that the reason of admitting was borne in mind, and carefully explained to the jury, if there was one.

However, when section 124 of the Criminal Procedure Code operates, I do not think that the jury can ever be invited to draw an inference from the reaction of an accused person. Therefore in such cases evidence of this kind should never be admitted. Section 27 in certain cases permits evidence of what an accused person said, by way of exception to section 124 of the Criminal Procedure Code and of the provisions relating to confessions. But evidence must be given of what the appellant said. Nothing justifies inviting the jury to guess what he said.

In view of this I consider that the conviction of the first appellant should be quashed.

As regards the second appellant, the position is rather different.

There evidence was not given of what the Police said in his presence. His own evidence clearly showed that he had on the morning after the robbery pawned certain articles in respect of which there was satisfactory evidence that they had been stolen at the time of the robbery. There was also evidence from which the jury might infer that this appellant had used a false name at the time of the pawning. Though there was evidence on which the jury might have convicted, there are passages in the summing up towards the end — "if you believe it, you believe it entirely" (p. 60), "if you believe their story in full" (p. 62) — which seem to suggest a rather heavier burden on the accused than the law requires, although elsewhere the position had been explained adequately to the jury. There is, however, a passage in the summing up which I think may have misled the jury. After dealing with a visit to pawnshops in which certain articles were recovered, the learned Judge, who had commented on the point that there was no evidence of what the Police had said to the second appellant, said: "There might be evidence that Police had asked the accused 'where is the property you stole?'..... There is not even that evidence." I think that that passage is likely to have misled the jury into thinking that something of the sort had been said, or that they could infer that it had been said. In view of that I consider that the appeal of the second appellant should be allowed also.

Appeal allowed.

DIANA ELLIS v. KHOO EK NEO & ANOR.

[Court of Appeal (Murray-Aynsley, C.J., Storr and Thorogood, JJ.) August 22, 1950]

[Singapore — Civil Appeal No. 8 of 1950]

Conveyancing and Law of Property Ordinance (Cap. 118) — Implied covenants for title — Conveyance free from encumbrances — Reconveyance executed by Custodian of Enemy Property during Japanese occupation — Claim for damages — Procedure — Debtor and Creditor (Occupation Period) Ordinance, 1949.

In this case the appellant, Khoo Ek Neo, was the owner of certain premises in Telok Ayer Street, Singapore. These premises were mortgaged to the plaintiff, Diana Ellis. During the Japanese occupation a reconveyance was executed by the Japanese Custodian of Enemy

Property and subsequently the premises were conveyed to the respondent, Tham Khiam Chow. The plaintiff, Diana Ellis, took out an originating summons under the Debtor and Creditor (Occupation Period) Ordinance, 1949, asking for orders declaring that the reconveyance made by the Japanese Custodian of Enemy Property was void and charging the property formerly mortgaged with a sum calculated in accordance with that ordinance. The mortgagor filed an affidavit setting out that she did not intend to oppose these claims by the mortgagee; but alleging further that the purchaser, Tham Khiam Chow, and her husband had during the negotiations for the purchase orally agreed to indemnify the mortgagor against any claims which might be made by the mortgagee against the mortgagor. The purchaser and her husband then filed affidavits in rely repudiating the alleged agreement for indemnity; and also claiming that not only had the purchaser never agreed to indemnify the mortgagor but on the other hand she had lodged a claim against the mortgagor for damages for breach of the statutory covenants for title implied in the assignment to her. Thereupon further affidavits were filed by the mortgagor and the purchaser, each insisting on her claims. At the hearing of the originating summons the mortgagor made no defence to the claims of the mortgagee, but insisted on her claim to be indemnified by the purchaser against all the claims of the mortgagee; and on the other hand the purchaser asked for a declaration that the mortgagor (the first defendant) was liable to the purchaser for damage for breach of the implied statutory covenants for title contained in the assignments by the mortgagor to the purchaser. The learned trial Judge held (see (1950) M.L.J. 168) that since the actual breach was not disputed, the second defendant was entitled against the first defendant to the declaration for which she asked. The first defendant appealed against this decision.

Held, (1) that the second defendant (respondent) was liable for breach of the implied covenant for title; (2) that the court had jurisdiction under section 11(5) (d) of the Debtor and Creditor (Occupation Period) Ordinance, 1949, to make the declaration asked for, even though the proceedings had been taken by way of originating summons.

Semble: It may well be that the Court may in some cases find it inconvenient to dispose of a claim of this kind in proceedings taken by way of originating summons particularly where there are serious questions of fact to be decided. In such a case the Court might refuse to make an order on the originating summons and let the claimant proceed by action.

APPEAL from an order of Evans, J.

Philip Hoalim for the appellant, Khoo Ek Neo.

John Laycock for the respondent, Tham Khiam Chow.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — In the present case the appellant was the owner of certain premises in Telok Ayer Street in this city. These premises were mortgaged to the plaintiff. On September 27th, 1944, the appellant entered into a contract of sale with the respondent in respect of this property. Two provisions in the contract are to be noted: the appellant agreed to convey free from encumbrances and clause 12 of the agreement reads as follows :—

"12. The Purchaser hereby acknowledges that the Reconveyance of the existing mortgages in favour of Diana Ellis will be executed by the Custodian of Enemy Property and no objection or requisition shall be made in connection therewith whatsoever."

On February 12th, 1945, two conveyances were executed, one by the Custodian (Japanese) of Enemy Property, a reconveyance of the property in question free from the plaintiff's mortgage, the second a conveyance by the appellant to the respondent of the property. In this there was nothing to qualify the covenants for title implied by the Conveyancing Ordinance. The plaintiff took no part in these transactions. It cannot, I think, be disputed that the purported reconveyance by the enemy custodian would be inoperative to free the land from the claims of the plaintiff and that apart from statute the plaintiff could have asserted her rights against the respondent to the full amount of the mortgage debt. The position is, therefore, that the appellant did not convey to the respondent free from encumbrances and there was thus a breach of one of the implied covenants for title. For this the respondent would have had a claim against the appellant for damage.

The rights of the plaintiff were curtailed at first by the moratorium and later by the Debtor and Creditor (Occupation Period) Ordinance, 1949.

By this Ordinance the act of the enemy custodian was for the first time given any validity. By this Ordinance the payment made to the custodian was made partially effective and the reconveyance was given a certain validity in that the plaintiff was reduced to taking the steps prescribed by the Ordinance in order to have her security restored for the revalued amount. This legislation conferred a benefit on the appellant by reducing the amount for which she was liable under the covenant for title. Otherwise the Ordinance does not affect the matter. The obligation of the appellant arises from the covenant alone.

The appellant has at no time taken steps to have the conveyance to the respondent rectified by qualifying the implied covenants for title. In view of the terms of the contract of sale I do not think she would have succeeded if she had made the attempt. Having regard, as we must, to the covenant in its unqualified form there can be no doubt of the liability of the appellant.

The only question, I think, is whether the right procedure has been adopted. The order appealed against was made in the Originating Summons taken out by the plaintiff against the appellant and the respondent. The plaintiff was obliged to proceed by way of Originating Summons or Originating Motion however unsuitable a procedure that might be. The normal mode of procedure for the respondent was by writ and action. Her claim is a straight out one for damages. Section 11 (5) gives the Court power to deal with certain questions, in three kinds of circumstance. The case of the respondent is (b); the respondent is a purchaser affected by the reinstatement of the security. In these cases the creditor or the debtor or any person interested (this clearly includes the respondent) may apply for such relief as the nature of the case requires and the Court may make such further or other order as to the Court shall seem fit. This last would, I think, include a money judgment.

It appears to me, therefore, that the Court had jurisdiction to make the order it did against the appellant. It should be noted, however, that no objection was taken to the procedure by the appellant. It may well be that the Court finds it inconvenient to dispose of a claim of this kind by way of an Originating Summons, particularly where there were serious questions of fact to be decided. In such a case the Court might refuse to make an order on the Originating Summons and let the party proceed by action.

The appeal should be dismissed with costs.

Storr, J. : — I have had the advantage of reading the judgment of the learned Chief Justice in this appeal with which I entirely agree and have nothing to add.

Thorogood, J. : — I have had the advantage of seeing the judgment of the learned President with which I concur. I have nothing to add.

Appeal dismissed.